IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEBORAH TEMPARALI	:	**CIVIL ACTION**
	:	
v.	:	
	:	
ROBERT E. RUBIN, SECRETARY OF THE TREASURY and BARRY GOOCH	:	**NO. 96-5382**

M E M O R A N D U M

WALDMAN, J. **June 19, 1997**

Plaintiff has asserted a Title VII employment discrimination claim against defendant Robert E. Rubin in his capacity as Secretary of the Treasury. She alleges that she was subjected to a hostile work environment. Plaintiff also asserts state law claims for assault and battery and intentional infliction of emotional distress against defendant Barry Gooch. The sole basis asserted by plaintiff for subject matter jurisdiction over these claims is supplemental jurisdiction, citing 28 U.S.C. § 1367. Defendants have both filed Motions to Dismiss plaintiff's claims.

The following appears from the allegations in plaintiff's complaint.

Plaintiff has worked for the Internal Revenue Service ("IRS") since May 1989. At all pertinent times, she has worked at the IRS office in Philadelphia. Defendant Gooch works for the IRS in its Salt Lake City office. Plaintiff, Mr. Gooch and four other employees were assigned to a special project team. The team conducted its work by weekly telephone conference calls, but

also met on several occasions for work sessions including the week of June 12, 1995 in Atlanta. After the final work session on June 15, 1995, team members met at a bar to drink and socialize. Plaintiff became "quite intoxicated." After leaving the bar, she, defendant Gooch and another team member walked back to their hotel. Defendant Gooch physically forced plaintiff into her room and then raped her.

Plaintiff alleges that she became "extremely upset and distraught" after the rape, felt ashamed and "completely insane." She states she was petrified of defendant Gooch. After learning on July 18, 1995 that she was pregnant, plaintiff telephoned Mr. Gooch to inform him. He "made it clear that she should not tell anyone." Mr. Gooch left the team in August 1995.

Plaintiff consulted with private counsel in August 1995 about issues of paternity, child custody and support payments.

In early November 1995, accompanied by her parents, plaintiff saw another lawyer to discuss support payments and possible legal action. This was the first occasion on which plaintiff related that she had been raped.

Plaintiff did not believe she had an employment discrimination claim because the incident occurred outside the workplace and working hours, and sexual harassment materials distributed to employees referred to workplace conduct.

On November 16, 1995 plaintiff met with her present attorney who told her that she may have an employment

discrimination claim because she was on "official travel" and "duty status."

On November 20, 1995 plaintiff called the Equal Employment Office (the "EEO"). She was first interviewed by an EEO counselor on November 27, 1995. She had a final meeting with another EEO counselor on December 18, 1996 who told plaintiff that the matter was "for the police, not the EEO." The counselor notified IRS security of plaintiff's allegation. Defendant Gooch has not been dismissed or disciplined. Plaintiff filed a formal complaint of employment discrimination with the Department of the Treasury on March 11, 1996. By letter of May 10, 1996, Dorian Morley, Director of the Regional Complaint Center, dismissed plaintiff's complaint as untimely.

In assessing a Rule 12(b)(6) motion, the court assumes to be true the factual allegations in the complaint and views them in a light most favorable to plaintiff. See Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no facts to support the claim which would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Notheast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A complaint may be dismissed when the facts alleged and the reasonable

inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). Title VII prohibits discriminatory conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)). A single act of sexual harassment may be sufficient to create a hostile work environment if it is of such a nature and occurs in such circumstances that it may reasonably be said to characterize the atmosphere in which a plaintiff must work. Bedford v. Southeastern Pennsylvania Trans. Authority, 867 F. Supp. 288, 297 (E.D. Pa. 1994).

To sustain a hostile work environment claim, a plaintiff must show that: (1) she suffered intentional discrimination based on her sex; (2) the discrimination was severe or pervasive; (3) she was detrimentally affected by the discrimination; (4) the discrimination would detrimentally affect a reasonable person of the same sex in her position; and, (5) there is respondeat superior liability. Meritor, 477 U.S. at 67; Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir.

1990). Courts are guided by agency principles in determining employer liability for a hostile work environment. Meritor, 477 U.S. at 72; Bouton v. BMW of North America, Inc., 29 F.3d 103, 106 (3d Cir. 1994).

An employer is liable if management-level employees had actual or constructive knowledge about the existence of a sexually hostile work environment and failed to take prompt and adequate remedial action. Andrews, 895 F.2d at 1486. An employer must take action that is reasonably likely to stop the harassment. Saxton v. AT&T Co., 10 F.3d 526, 535-536 (7th Cir. 1993). "A remedial action that effectively stops the harassment will be deemed adequate as a matter of law." Knabe v. The Boury Corp., 1997 WL 282905, *8 n.8. (3d Cir. May 29, 1997).

In her brief, plaintiff argues that the IRS had notice of Mr. Gooch's propensities because of rumors about his inappropriate sexual conduct with women in his office. In her complaint, plaintiff alleges that following the rape Mr. Gooch told her he could not speak to her because "his wife was suspicious due to rumors about him at work," and "about him and women in his office." There is no allegation of where these rumors originated, where they were repeated, where the wife heard them or who, if anyone, in the workplace knew of them. Moreover, there is no allegation these rumors had anything to do with unwanted sexual advances or harassment in the workplace rather than consensual adulterous conduct. While an employer has an obligation to respond to complaints of particular acts of

harassment, an employer is not required to act upon ambiguous rumors.

Plaintiff also argues that by failing to take remedial action, the IRS effectively "ratified the prior sexual harassment of the plaintiff by Gooch," citing Fuller v. City of Oakland, CA, 47 F.3d 1522 (9th Cir. 1995). That case, however, involved harassment by an employee who was permitted to continue to supervise the victim after the harassment. Id. at 1526. Requiring the victim of sexual harassment to work under the supervision of the harasser may "alter the conditions of the victim's employment" and create an "abusive working environment." Id. at 1527. As the Court in Fuller noted, the plaintiff was placed in a situation where she "couldn't escape" from her harasser. Id. at 1528. While conduct outside the workplace and work hours ordinarily does not create a hostile work environment, see Candelore v. Clark County Sanitation District, 975 F.2d 588, 590 (9th Cir. 1992), an employee who is forced to work for or in proximity to someone who is harassing her outside the workplace may reasonably perceive the work environment to be hostile as a result.

Plaintiff and Mr. Gooch, however, worked in IRS offices thousands of miles apart. The alleged conduct occurred outside the place and scope of employment after the parties were socializing in a bar and plaintiff was "quite intoxicated." The only contact plaintiff had with Mr. Gooch after June 16, 1995 was brief and telephonic. Plaintiff was not required to work again

in physical proximity to Mr. Gooch. She was not required to perform her job in a hostile work environment. Her employment conditions were not altered.

If the IRS failed fairly to investigate plaintiff's charge, it could be liable as a result to female employees later harassed by Mr. Gooch or others assaulted by those encouraged by indifference to that charge.

Such a failure would also be irresponsible. There is, however, no allegation that the IRS failed to investigate or decided cavalierly to take no action against Mr. Gooch. There also is no allegation that the IRS disregarded the findings of any other investigative authority. Indeed, there is no allegation or suggestion that plaintiff ever presented her charge to appropriate law enforcement officials in Altanta or authorized anyone else to do so.[1]

It does not appear from plaintiff's allegations that the conditions of her employment were altered or that she was subject to a hostile work environment for which her employer should be liable.

In any event, there is a more glaring and fatal deficiency in plaintiff's federal claim.

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1. In an affidavit presented in connection with an issue of personal jurisdiction, Mr. Gooch avers that he and plaintiff engaged in consensual sexual intercourse. For purposes of the motions, the court assumes to be true plaintiff's allegation that she was raped.

An aggrieved federal employee must initiate contact with an EEO counselor within 45 days of the alleged occurrence of discrimination. See 29 C.F.R. § 1614.105(a)(1). The time requirements in Title VII are part of a carefully crafted statutory scheme and are to be taken seriously. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); E.E.O.C. v. Great Atlantic & Pacific Tea Co., 735 F.2d 69, 73 (3d Cir.), cert. denied, 469 U.S. 925 (1984). See also Hornsby v. U.S. Postal Service, 787 F.2d 87, 90 (3d Cir. 1986) (complaint fails to state Title VII claim unless it asserts compliance with administrative submission requirements). Where it is apparent from the complaint that a discrimination claim is time-barred, it may be dismissed. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994).

A statute of limitations begins to run when a plaintiff's cause of action accrues. Oshiver, 38 F.3d at 1385. The cause of action accrues on the date on which the plaintiff discovers that she was injured. Id. The question is not whether plaintiff knew she had a viable legal claim, but when she knew she was injured. In a federal cause of action, a claim accrues "upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong." Id. at 1386. There is no question that plaintiff was aware of the rape on the date it occurred even if, as she contends, she did not know that it might support an employment discrimination claim.

Plaintiff's injury occurred on the date she alleges she was raped. She was aware of the actual injury on that date. She did not initiate contact with an EEO counselor until 158 days later.[2] The discovery rule does nothing to delay the beginning of the applicable 45-day time period. See Oshiver, 38 F.3d at 1391 (discovery rule inapplicable to discriminatory discharge claim as plaintiff was aware of injury on date of discharge even if she was deceived about discriminatory motive); Jordan v. Smithkline Beecham, Inc., 1997 WL 164277, * 10 (E.D.Pa April 3, 1997) (discovery rule did not toll time limit for filing discriminatory discharge claim although plaintiff did not discover basis for claim until time period had lapsed as he was aware of his injury when he lost his job).

Because they are analogous to statutes of limitations, the time limits in Title VII are subject to equitable tolling. Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982); Oshiver, 38 F.3d at 1387. The burden is on the plaintiff to demonstrate facts that justify tolling the limitations period. See Byers v. Follmer Trucking Co., 763 F.2d 599, 600-01 (3d Cir. 1985); Arizmendi v. Lawson, 914 F. Supp. 1157, 1160 (E.D. Pa. 1996). Federal courts generally permit equitable tolling only in very limited circumstances, principally where the defendant has

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2. Plaintiff does not assert and it is not at all clear that she filed her formal complaint of discrimination within fifteen days after the counseling period. See 29 C.F.R. § 1614.105(d)-(f). As the Secretary asserts only the failure to comply with the 45-day requirement, however, the court has confined its consideration to that issue.

"actively misled" a plaintiff regarding her claim, where a plaintiff has been prevented from asserting her rights in some "extraordinary" manner or where plaintiff has timely asserted her rights but in the wrong forum. See Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990); Oshiver, 38 F.3d at 1387; School District of City of Allentown v. Marshall, 657 F.2d 16, 19-20 (3d Cir. 1981). To obtain equitable tolling, a plaintiff must show that she could not have discovered essential factual information bearing on her claim by the exercise of reasonable diligence. Oshiver, 38 F.3d at 1390; Cada v. Baxter Healthcare Corp., 920 F.2d 446, 452 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991).

Plaintiff argues that she was misled by the IRS because there were no references to "nonworkplace" discrimination in sexual harassment materials distributed to employees but only references to harassment in the "workplace." This does not satisfy plaintiff's burden to show that the IRS "actively misled" her regarding her claim. See Oshiver, 38 F.3d at 1391 (contrasting employer giving plaintiff false reason for discharge and failure of employer to provide plaintiff with pertinent information from which a claim could be discerned).

Plaintiff also argues that she was misled by the EEO counselor who told her that "the matter was one for the police, not the EEO." Even assuming that this was misleading conduct, plaintiff ignores the fact that she did not initiate contact with

any EEO counselor until long after the 45-day time limit had expired.

Plaintiff does allege that she was "extremely upset and distraught" and was "feeling completely insane." The Supreme Court has warned against broadening equitable modification of the Title VII limitations period. See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984). Being upset does not prevent one from pursuing relief for that which has upset her, and is not a recognized ground for equitable tolling. See Thaxton v. Runyon, 1995 WL 128031, *3 (E.D. Pa. Mar. 24, 1995).

Some courts have recognized mental illness as a basis for equitable tolling, but only under very limited circumstances. To toll a federal statute of limitations, a plaintiff must suffer from a mental illness which prevents her from managing her own affairs and renders her incapable of pursuing her legal rights. See Miller v. Runyon, 77 F.3d 189, 191 (7th Cir.), cert. denied, 117 S. Ct. 316 (1996). See also Nunnally v. MacCausland, 996 F.2d 1, 6 (1st cir. 1993) (limitations period for Rehabilitation Act claim by schizophrenic plaintiff may be tolled only if her mental condition "disordered her ability to reason and function" and "rendered her incapable of ... pursuing her claim"); Decrosta v. Runyon, 1993 WL 117583, *2-3 (N.D.N.Y. Apr. 14, 1993) (handicap discrimination plaintiff with "major depressive" disorder may not toll time limit for contacting EEO counselor where condition did not impede ability to function); Speiser v. U.S. Dep't. of Health and Human Services, 670 F. Supp. 380, 384

(D.D.C. 1986) (Rehabilitation Act plaintiff may not toll time for lodging complaint with EEO counselor because of mental disorder where she cannot demonstrate inability to manage her affairs or comprehend her rights), aff'd, 818 F.2d 95 (D.C. Cir. 1987); Bassett v. Sterling Drug, Inc., 578 F. Supp. 1244, 1248 (S.D. Ohio 1984) (administrative filing period for ADEA claim may be tolled for mental condition only for time plaintiff is adjudicated incompetent or institutionalized for mental incompetence).

Plaintiff has failed to allege any facts which would show that she had a mental condition that prevented her from managing her own affairs or pursuing a legal claim. To the contrary, plaintiff acknowledges that she continued to work and that well before she went to the EEO counselor, she was able to consult with an attorney about paternity, custody and support issues.

Accordingly, plaintiff's federal claim must be dismissed for failure timely to exhaust administrative remedies which are a prerequisite to suit.

Defendant Gooch predicates his motion on a lack of personal jurisdiction and venue. He also argues that in the absence of a viable federal claim, there is no basis to exercise supplemental jurisdiction.

Venue clearly lies in this district for plaintiff's federal claim against Secretary Rubin as plaintiff resides in this district and no real property is involved in this action.

See 28 U.S.C. § 1391(e)(3). As the language of that statute makes clear, however, venue requirements which would be applicable if a federal officer were not a party must be satisfied as to any additional person joined as a party. There is clearly no venue in this district for plaintiff's tort claims against defendant Gooch. Defendant does not reside here and a substantial part of the events giving rise to the tort claims did not occur in this district.[3]

In deciding a motion to dismiss for lack of personal jurisdiction, the allegations in the complaint are taken as true. Once a defendant asserts a jurisdictional defense, however, the plaintiff bears the burden of proving sufficient minimum contacts with the forum state to establish personal jurisdiction. North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689 (3d Cir.), cert. denied 498 U.S. 847 (1990).

Mr. Gooch's averment that he has not engaged in activity in Pennsylvania and has not been in the state in twenty years is uncontroverted. Rather, plaintiff argues that defendant has sufficient minimum contacts with this forum to sustain specific jurisdiction. She points to two things.

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3. Plaintiff argues that there is venue in this district because she contacted an EEO counselor here regarding her Title VII claim. Plaintiff seems to confuse what is a significant administrative requirement or event for one who wishes to preserve or pursue a claim and an event giving rise to the claim. Moreover, the claims at issue here are not Title VII hostile workplace claims but tort claims arising from acts in Georgia.

The first is that on July 18, 1995 Mr. Gooch returned a telephone call from plaintiff who was in Pennsylvania. It was in this telephone conversation that plaintiff informed Mr. Gooch that she was pregnant. That a defendant returns a telephone call initiated by a plaintiff from the forum is clearly insufficient to sustain personal jurisdiction. See Jaffe v. Julian, 754 F. Supp. 49, 52 (E.D. Pa. 1991). Moreover, plaintiff's tort claims do not arise from that contact. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414-16 (1984); Gehling v. Saint George's School of Medicine, Ltd, 773 F.2d 539, 541 (3d Cir. 1985).

Plaintiff also points to the filing by Mr. Gooch in a Pennsylvania court action of a claim for visitation rights with the child since born to plaintiff. As plaintiff chose to remain in Pennsylvania with the child, it is only from the courts of this state that Mr. Gooch realistically could obtain enforceable visitation rights. That plaintiff's choice to remain with the child in Pennsylvania effectively compels the resolution of pertinent domestic relations law matters here no more confers personal jurisdiction in this action that would her decision to move to New Jersey have subjected defendant to suit in the courts of that state for the alleged torts committed in Atlanta in June 1995. As plaintiff herself acknowledges the Pennsylvania visitation and support case is "separate and distinct from the action at issue herein." Plaintiff's tort claims against Mr.

Gooch do not arise from his subsequent participation in the domestic relations case in Pennsylvania.

Plaintiff also invokes the so-called effects test or tort out-harm in basis for jurisdiction. Plaintiff argues that the rape in Georgia resulted in harm to her in Pennsylvania because she continued to suffer anxiety after returning to Pennsylvania. On this theory, a tortfeasor could virtually always be haled into court in the district in which the plaintiff happened to live. Plaintiff confuses acts which cause foreseeable injury in the forum state or to a forum resident and acts purposefully targeted at the forum state. See Narco Avionics, Inc. v. Sportsman's Market, Inc., 792 F. Supp. 398, 407-08 (E.D. Pa. 1992).

Plaintiff has failed to establish that the court has personal jurisdiction over defendant Gooch on her tort claims against him.

Plaintiff's claims against defendant Gooch will be dismissed for lack of venue and personal jurisdiction without prejudice to plaintiff to reassert these claims in Georgia or Utah. She will have 30 days to do so and possibly 180 days to do so in Georgia. See 28 U.S.C. § 1367(d).[4]

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4. Georgia law provides a six month renewal period when a case commenced in a federal court has been dismissed. See O.C.G.A. § 9-2-61(a). On its face, the statute applies only to cases voluntarily dismissed. The Georgia courts, however, have held that it also applies to cases involuntarily dismissed on grounds not involving an adjudication of the merits. See O'Neal v. DeKalb County, 667 F. Supp. 853, 859 (N.D. Ga. 1987), aff'd, 850 (continued...)

Accordingly, defendants' motions will be granted. Appropriate orders will be entered.

4. (...continued)
F.2d 653 (11th Cir. 1988).

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O R D E R

AND NOW, this day of June, 1997, upon consideration of defendant Rubin's Motion to Dismiss (Doc. #9) and defendant Gooch's Motion to Dismiss (Doc. #4), and plaintiff's responses thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motions are **GRANTED** and the above action is **DISMISSED**, without prejudice to plaintiff to reassert her claims against defendant Gooch in an appropriate court in Georgia or Utah.

BY THE COURT:

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JAY C. WALDMAN, J.